MISCELLANY.

Master and Servant—Federal Employer's Liability Act—State Workmen's Compensation Acts.—In the preceding issue of the Register there was occasion to comment on the rulings of the United States Supreme Court in cases involving the application of the Federal Employer's Liability Act and State Workmen's Compensation Acts. The following dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Clark concurred, is considered such a complete compilation of the legislation and decisions on this subject that it is reproduced here in full.

I dissent from the opinion of the court; and the importance of the question involved induces me to state the reasons.

By the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words, the majority of the court declares that Congress, by passing the Employers' Liability Act, prohibited states from including within the protection of their general Workmen's Compensation Laws employees who, without fault on the railroad's part, are injured or killed while engaged in interstate commerce; although Congress itself, offered them no protection. That Congress could have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." New York C. R. Co. *v.* White, 243 U. S. 188, 207, ante, 247, 254, 37 Sup. Ct. Rep. 247. And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Sherlock *v.* Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820.

2. "If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state." Savage *v.* Jones, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715.

3. "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 623, 42 L. Ed. 878, 881, 18 Sup. Ct. Rep. 488.

Guided by these rules and the cases in which they have been applied[4] we endeavor to determine whether Congress, in enacting the

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4. The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the states of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the Federal legislation.

1. In Sligh *v.* Kirkwood, 237 U. S. 52, 62, 59 L. ed. 835, 839, 35 Sup. Ct. Rep. 501, it was held that the Federal Food and Drugs Act, dealing, among other things, with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition, did not prevent a state from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 829, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce, preclude the states from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In Missouri, K. & T. R. Co. *v.* Harris, 234 U. S. 412, 420, 58 L. ed. 1377, 1382, L. R. A. 1915E, 942, 34 Sup. Ct. Rep. 790, it was held that the Carmack Amendment (34 Stat. at L. 584, 595, chap. 3591, Comp. Stat. 1916, §§ 8563, 8604a, 8604aa), regulating the carrier's liability for loss of interstate shipments, did not prevent a state from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In Savage *v.* Jones, 225 U. S. 501, 529, 56 L. ed. 1182, 1193, 32 Sup. Ct. Rep. 715, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited

Employers' Liability Act, intended to prevent states from entering the specific field of compensation for injuries to employees arising without fault on the railroad's part, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Con-

misbranding, did not prevent the states from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In Missouri P. R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 623, 53 L. ed. 352, 361, 29 Sup. Ct. Rep. 214, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit states from legislating on the subject.

6. In Asbell *v.* Kansas, 209 U. S. 251, 257, 52 L. ed. 778, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any state without further inspection, did not prevent a state from penalizing the importation of cattle which had not been inspected either by the Federal Bureau or by designated state officials.

7. In Crossman *v.* Lurman, 192 U. S. 189, 199, 48 L. ed. 401, 405, 24 Sup. Ct. Rep. 234, it was held that the Act of Congress of August 30, 1890 (26 Stat. at L. 414, chap. 839, Comp. Stat. 1916, § 8683), prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the states from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibitions of their statutes.

8. In Reid *v.* Colorado, 187 U. S. 137, 149, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, it was held that Congress, by making it an offense under the Animal Industry Act for anyone to send from state to state cattle known to be affected with communicable disease, did not prevent the states from penalizing the importation of cattle without inspection by designated state officials.

9. In Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 623, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a state from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In Smith *v.* Alabama, 124 U. S. 465, 482, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the states from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In Sherlock *v.* Alling, 93 U. S. 99, 23 L. ed. 819, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases prohibit the application to an accident in navigable waters of a state of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes the common or statutory laws of the states relating to the liability of railroads for negligent injuries to their em-

gress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope, and purpose; and, on the other, at the nature, methods, and means of state Workmen's Compensation Laws. If the will is not clearly expressed in words, we must consider all these in order to determine what Congress intended.

First: As to words used: The act contains no words expressing a will by Congress to cover the whole filed of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of that act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act Relative to the Liability of Common Carriers by Railroad in Certain Cases."[5]

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ployees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both Federal and state laws there under consideration being idential: Second Employers' Liability Cases (Mondou *v.* New York, N. H. & H. R. Co.), 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri, K. & T. R. Co. *v.* Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 66, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; St. Louis, I. M. & S. R. Co. *v.* Hesterly, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. *v.* Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor *v.* Taylor, 232 U. S. 363, 368, 58 L. ed. 638, 640, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Seaboard Air Line R. Co. *v.* Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Wabash R. Co. *v.* Hayes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Toledo, St. L. & W. R. Co. *v.* Slavin, 236 U. S. 454, 458, 59 L. ed. 671, 673, 35 Sup. Ct. Rep. 306; St. Louis, I. M. & S. R. Co. *v.* Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754; Chicago, R. I. & P. R. Co. *v.* Devine, 239 U. S. 52, 54, 60 L. ed. 140, 142, 36 Sup. Ct. Rep. 27; Chicago, R. I. & P. R. Co. *v.* Wright, 239 U. S. 548, 551, 60 L. ed. 431, 434, 36 Sup. Ct. Rep. 185; Seaboard Air Line R. Co. *v.* Kenney, 240 U. S. 489, 493, 60 L. ed. 62, 765, 36 Sup. Ct. Rep. 458; Osborne *v.* Gray, 241 U. S. 16, 19, 60 L. ed. 865, 867, 36 Sup. Ct. Rep. 486.

5. The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910 (36 Stat. at L. 884), proposing a Fed-

Second: As to specific action taken: The power exercised by Congress is not such that, when exercised it necessarily excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the states. Between the Federal and the state law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third: As to origin, purpose, and scope of the Employers' Liability Act and the nature, methods, and means of state Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that, by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) The origin of the Federal Employers' Liability Act.

By the common law as administered in the several states, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work, subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of respondeat superior. This legal liability, which, in theory, applied between employer and employee as well as between others, came, in course of time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk, and of contributory negligence, rose and flourished. When applied to huge organizations and hazardous occupations, as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the eflorts to secure remedial legislation widespread. But the opponents were alert, potent, and securely entranched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing

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eral Workmen's Compensation Law, which reads: "A Bill to Provide an Exclusive Remedy and compensation for Accidental Injuries Resulting in Disability or Death to Employees of Common Carriers by Railroad Engaged in Interstate or Foreign Commerce, or in the District of Columbia, and for other Purposes." (Sen. Doc. 338, p. 107, 62d Cong. 2d Sess.)

the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act (Act of June 11, 1906, 34 Stat. at L. 232, chap. 3073), fifty years elapsed. In those fifty years only four more states had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one state had a statute been passed making recovery possible where the employee had been guilty of contributory negligence.[6] Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-06 the number killed while on duty was 3,807, and the number

6. At the time the first Federal Employers' Liability Act was passed the so-called common-law defenses remained in force, in large part, in most of the states, as to railroad employees.

A. The fellow-servant rule.—(See compilation of statutes in "Liability of statutes in "Liability of Employers," Senate Hearings 1906, pp. 183-288, and in Senate Document No. 207, 60th Congress, 1st Session.)

(1) It had been completely abolished as to railroad employees in only five states: Georgia (1856), Kansas (174), North Carolina (1897), Colorado (1901); North Dakota (1903).

(2) It remained in full force, or substantially so, in twenty-five states or territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

(3) In sixteen other states it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first Federal act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania, and Wisconsin.

B. Contributory negligence.—(See compilations cited supra.)

(1) In all but one state there had been no statutory change of the rule that contributory negligence constituted a complete defense. Georgia (1895) had substituted the comparative-negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first Federal act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several states introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. Assumption of risk—(See the compilation cited supra.)

The harshness of this rule had been mitigated by statute or other statutory action taken in only fourteen states: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

injured 55,524.[7] The promoters of remedial action, unable to overcome the efficient opposition presented in the legislature of the several states, sought and secured the powerful support of the President.[8] Congress was appealed to and used its power over interstate commerce to afford relief. The promotion of safety was, of course, referred to in the committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.[9] There was, in the nature of things, no more reason for providing a Federal remedy for negligent injury to employees, than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances attending its passage were such as to preclude the belief that thereby Congress intended to deny to the states the power to provide for compensation or relief for injuries not covered by it.

(B) The Scope of the Federal Employers' Liability Act.

(1) The act leaves uncovered a large part of the injuries which

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7. See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

8. President's Messages December 2, 1902: December 6, 1904; December 5, 1905; January 31, 1908.

9. The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection, and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several states, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908 no reference has been found, either in the annual president's address, or in the report of the committee on legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218-233, which is devoted to a consideration of harmonious or uniform legislation. It contains a résumé of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of nineteen years and attendances at congressional hearings on safety appliances, block signal, and hours of labor legislation.

result from the railroads' negligence. The decision of this court in the first Employers' Liability Cases (Howard *v.* Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees engaged in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the Federal law. For the act was held to apply only to those directly engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work for interstate commerce, as in repairing engines or car —are not directly engaged in it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, happen to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.[10]

(2) The act leaves uncovered all of the injuries which result otherwise than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.

(C) The purpose of the Employers' Liability Act.

The facts showing the origin and scope of the act discussed above indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence,—a right denied under judicial decisions through the interposition of the defenses of fellow servant, assumption of risk, and contributory negligence. It was not the purpose of the act to deny to the states the power to grant the wholly new right to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common-law liability for fault was to be restored by removing the abuses

10. Compare Illinois C. R. Co. *v.* Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153; New York C. R. Co. *v.* Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 7 N. C. C. A. 1; Delaware, L. & W. R. Co. *v.* Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Shanks *v.* Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. ed. 436, L. R. A. 1916C, 797, 36 Sup. Ct. Rep. 188; Chicago, B. & Q. R. Co. *v.* Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Erie R. Co. *v.* Welsh, 242 U. S. 303, ante, 116 37 Sup. Ct. Rep. 116; Raymond *v.* Chicago, M. & St. P. R. Co., 243 U. S. 43, ante, 268, 37 Sup. Ct. Rep. 268.

which prevented its full and just operation. The liability of the employer under the Federal act, as at common law, is merely a penalty for wrongdoing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the states the power to provide compensation or relief for injuries not covered by the act.

(D) The nature of Workmen's Compensation Acts.

In the effort to remove abuses, a study had been made of facts, and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation, even if the law were perfected and its administration made exemplary. For, in probably a majority of cases of injury, there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the conincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practised, society, which is served thereby, should in some way provide the protection. To attain this end, co-operative methods must be pursued; some form of insurance,—that is, some form of taxation. Such was the contention which has generally prevailed. Thus, out of the attempt to enforce individual justice grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908 [35 Stat. at L. 65, chap. 149, Comp. Stat. 1916, § 8657], these truths had gained little recognition in the United States. Not one of the thirty-seven states or territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted in the

following month (Act of May 30, 1908, 35 Stat. at L. 556, chap. 236). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress, by simply passing the Employers' Liability Act, prohibited the states from providing in any way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the state which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the state falls the financial burden of dependency, if provision be not otherwise made. Upon the state falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and the denial of opportunity. Upon the state also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the states the power to perform either this duty to humanity or their fundamental duy of self-preservation. And if the states are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) Methods and means of Workmen's Compensation Laws.

The principle underlying Workmen's Compensation Laws is the same in all the states. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributory groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insured: whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded on all these questions the laws of the several states do and properly may differ radically.

What methods and means the state shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate rests (subject to constitutional limitations) wholly within the judgment of the state. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing against the financial consequences of accidents through contributing an adequate

amount to an accident insurance fund. It might conclude that it was wise to make itself the necessary contributions to such a fund, out of moneys raised from general taxation. Or it might conclude, as the state of Washington did, that the fairest and wisest form of taxation for the purpose was to impose upon the employer directly the duty of making the required contributions,—relying upon the laws of trade to effect, through the medium of transportation charges, an equitable distribution of the burden. The method last suggested is pursued in substance also by the state of New York. In its essence the laws of the states are the same in this respect, as is shown in Mountain Timber Co. *v.* Washington, 243 U. S. 219, ante, 260, 37 Sup. Ct. Rep. 260. It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. And the right of the employee is as free from any suggestion of wrong done to him as the new right granted by Mothers' Pension Laws.

(F) Federal and state legislation are not in conflict.

The practical difficulty of determining in a particular case, according to presence or absence of railroad fault, whether indemnity is to be sought under the Federal Employers' Liability Act or under a state compensation law, affords, of course, no reason for imputing to Congress the will to deny to the states power to afford relief through such a system. The difficulty and uncertainty is, at worst, no greater than that which now exists in so many cases where it is necessary to determine whether the employee was, at the time of the accident, engaged in interstate or intrastate commerce.[11] Expedients for minimizing inherent difficulties will doubtless be found by experience. All the difficulties may conceivably be overcome in practice. Or they may prove so great as to lead Congress to repeal the Federal Employers' Liability Act and leave to the states (which alone can deal comprehensively with it), the whole subject of indemnity and compensation for injuries to employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

We are admonished also by another weighty consideration not to impute to Congress the will to deny to the states this power. The

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11. The number of cases on the October, 1915, term of this court, was 1,069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in interstate commerce or intrastate commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk.

subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our states and territories, so widely extended. In a large majority of instances they reside in the state in which the accident occurs. Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between states in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is not desirable, or at least not essential to the public welfare.

The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, pre-empted the whole field, has been made often in this court; and, as the cases above cited show, has been repeatedly rejected in cases where the will of Congress to leave the balance of the field open to state action was far less clear than under the circumstances here considered. Tested by those decisions and by the rules which this court has framed for its guidance, I am of opinion, as was said in Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280, 294, 58 L. ed. 1312, 1319, 34 Sup. Ct. Rep. 829, that "the intent to supersede the exercise of the state police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken." The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents. I find no justification for imputing to Congress the will to deny to a large class of persons engaged in a necessarily hazardous occupation [12] and otherwise unprovided for, the protection afforded by benefit statutes enacted in the long-deferred performance of an insistent duty and in a field peculiarly appropriate for state action.

Mr. Justice Clarke concurs in this dissent.

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12. The experience of the organization [Brotherhood of Locomotive Firemen and Enginemen] shows that more than 60 per cent of all deaths and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st Sess.

Race Discrimination in the South.—In Woods *v.* Bell (Tex. Civ. App.), 195 S. W. 902, it was held that assignments of error defective because containing statements of fact outside the record, etc., will

be considered where appellants, and counsel representing them, are negroes.

The court said: "However, from the fact that the people interested in the subject-matter are colored people, and from the further fact that they are being represented by colored counsel, who appeared in this court, it is judged to be proper that the strict rules be not enforced, and that the brief be considered."

IN VACATION.

Horse Sense v. Expert Testimony—The Mule's Testimony.—The originator of a widely known probation system, Judge William J. Pollard, of a St. Louis police court, is the subject of a story that illustrates a unique way of dealing out justice to minor offenders.

A driver had been brought before Judge Pollard, charged with cruelty to animals. He had been driving a galled mule, but he had an expert witness in a veterinarian, who testified that the sore on the mule's back did not pain the animal in the least.

The judge listened attentively to the long technical opinion, and then demanded to know the mule's whereabouts. He was informed that it was harnessed to a wagon that stood in the street in front of the court house. The judge then ordered that court be adjourned for five minutes.

He took his cane and proceeded to the street, went up to the mule, and with the end of his cane gently touched the sore spot on the animal's back. The mule promptly tried to kick the dashboard off the wagon. Once again the judge touched the sore spot with his cane, and the mule responded as before.

Judge Pollard returned to the bench. The prisoner was called before him.

"With all due respect to the expert testimony you have had introduced in your behalf to show that the mule's back does not pain him, I will fine you $50," announced the judge. "I asked the mule if the sore hurt him, and he said it did."—Case and Comment.